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OFFICE OF PETITIONS

In re Application of :
Cioletti et al. :
Application No. 10/532011 : **DECISION ON PETITION**
Filed: 10/17/2005 :
Atty Docket No. 335970-00024 :

This is a decision on the petition filed on 15 May, 2007, under 37 CFR 1.137(b),¹ to revive the above-identified application.

The petition is **GRANTED**.

The application became abandoned on 29 October, 2006, for failure to timely submit a proper reply to the non-final Office action mailed on 28 July, 2006, which set a three (3) month shortened statutory period for reply. Notice of Abandonment was mailed on 16 March, 2007.

Petitioner has filed a Request for Continued Examination (RCE) and an amendment as the required reply under 37 CFR 1.114.

NOTICE OF IMPROPER RCE

Pursuant to MPEP 706.07(f), an applicant cannot request continued examination of an application until after prosecution in the

¹ Effective December 1, 1997, the provisions of 37 CFR 1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition filed under the provisions of 37 CFR 1.137(b) must be accompanied by:

(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional utility or plant application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continuing examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof. In an application, abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

(2) the petition fee as set forth in 37 CFR 1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

application is closed. See 37 CFR 1.114(a). Prosecution in an application is closed if the application is under appeal, or the last Office action is a final action (37 CFR 1.113), a notice of allowance (37 CFR 1.311), or an action that otherwise closes prosecution in the application (e.g., an Office action under Ex parte Quayle, 25 USPQ 74, 453 O.G. 213 (Comm'r Pat. 1935)).

If prosecution in the application is not closed, applicant will be notified of the improper RCE and any amendment/reply will be entered. Thereafter, the application will be forwarded to the examiner for consideration of the amendment/reply under 37 CFR 1.111.²

Since the last Office action in this application was a non-final Office action, and the application is not under appeal, prosecution is not closed. Therefore, the RCE is improper. The RCE fee will be refunded. The amendment filed with the petition will be referred to the examiner for consideration on the merits.

An extension of time under 37 CFR 1.136 must be filed prior to the expiration of the maximum extendable period for reply.³ The three-month extension request filed on 15 May, 2007, was submitted after 28 January, 2007, which was the last day that an a petition for extension of time could be filed under 37 CFR 1.136(a) to the three (3) month shortened statutory period for reply to the Office action mailed on 28 July, 2006, and therefore is unnecessary. The extension of time fee paid on 15 May, 2007, will therefore be credited to counsel's deposit account as authorized.

This application is being referred to Technology Center 1751 for further processing.

Telephone inquiries concerning this matter may be directed to the undersigned at (571)272-3231.



Douglas I. Wood
Senior Petitions Attorney
Office of Petitions

² MPEP 706.07(h).

³ See In re Application of S., 8 USPQ2d 1630, 1631 (Comm'r Pats. 1988).